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CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM—1950

No. 307.....

EDWIN H. STERN, JR.,

Petitioner,

against

TEEVAL CO., INC.,

Respondent.

PETITION OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK, FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Attorney for the People of the State of New York,
Petitioner.

WENDELL P. BROWN,
Solicitor General,
ABE WAGMAN,
Special Assistant Attorney General,
Of Counsel.

340 Press of Fremont Payne, Inc.—80 Washington St., N. Y.—BOwling Green 9-8153

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PETITION OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Attorney General of the State of New York, on behalf of the People of the State of New York, respectfully prays the issuance of a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, the highest court of the State, wherein that Court, *inter alia*, declared New York City Local Law No. 73 of 1949, as validated by Chapter 1 of the Laws of the State of New York of 1950, and section 13-a of the Emergency Housing Rent Control Law of the State of New York (Laws 1950, ch. 250) to be in conflict with the Federal Housing and Rent Act of 1947, as amended (50 U. S. C. Appendix 1881, *et seq.*), and hence unconstitutional and invalid as violative of the Supremacy Clause (Article VI) of the Constitution of the United States.

Statement

The action was originally instituted in the Municipal Court of the City of New York by Teeval Co., Inc., a landlord, against Edwin H. Stern, Jr., a tenant, as a test of the validity of the newly enacted State rent law by which the State had taken over the control of residential rents and evictions, as authorized by the Federal Housing and Rent Act. Upon rendition of a judgment upholding the State statute, the unsuccessful landlord effected a direct appeal, on constitutional grounds, to the Court of Appeals.

Acting under the provisions of section 68 of the Executive Law of the State of New York, the Attorney General, on behalf of the People of the State, appeared, filed a brief and argued the cause before the Court of Appeals in support of the constitutionality of the statute.*

The Court of Appeals sustained the validity of all of the subject state statute excepting section 13-a thereof. In so doing, it also voided the related provisions of New York City Local Law No. 73, which had likewise been validated by the State Legislature.

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*The cited section 68 of the Executive Law provides: "Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute."

It is the declaration of invalidity of section 13-a, and the connected portions of the State validated local law, as being in conflict with a Federal statute and the Federal Constitution, which your petitioner respectfully prays should be reviewed by this Court.

The defendant-tenant, Edwin H. Stern, Jr., has similarly petitioned this Court for a writ of certiorari.* It is, therefore, respectfully asked that the instant petition of the Attorney General be considered not only in its independent status but also as in support of the tenant's application. In view of the detailed discussion of the subject in the tenant's petition, we shall, as far as possible, attempt to avoid repetitious argument.

Jurisdiction

Authority for the issuance of a writ of certiorari herein is contained in section 1257, subd. 3 of Title 28 of the United States Code (62 Stat. 929).

The Facts

In 1949, after some six years of rent control under the war power, Congress, in carrying out its avowed purpose of shifting from a national to a local basis the onus of determining the need for, and the extent of, continued control over residential rentals, extended Federal regulation for an additional year, but, at the same time, gave authority to each State to divorce itself from Federal controls either by assuming a decontrolled status or else by adopting its own system of controls. Federal Housing and Rent Act, sec. 204 (jl, 2); 50 U. S. C. Appendix 1894 (jl, 2); see also, Report of the Senate Committee on Banking and Currency (1949 U. S. Code Congressional Service, vol. 2, p. 1140, at p. 1146).

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*The record and other formal papers are to be filed with the tenant's petition.

Acting under this Congressional disavowal of preemption of the field of residential rent control, the State of New York has, as of May 1, 1950, supplanted Federal regulation with its own complete system of control over rents and evictions. The Court of Appeals has sustained the validity of all portions of the Act but section 13-a.

A verbatim recital and proper understanding of this single section which has been held violative of the Supremacy Clause and stricken from the pattern of rent control adopted and deemed necessary by the State legislature, must, we think, be preceded by a brief review of its background.

The same amendatory Act which made plain Congressional intent to restore rent control to a local level, also took a long step toward tapering off the austerity of controls in those areas which continued in the Federal orbit until State action could or would be taken. In continuing the provision empowering the Housing Expediter to adjust maximum rental ceilings "as may be necessary to remove hardships or to correct other inequities," there was inserted the following additional language (sec. 204 (b) (1); 50 U. S. C. Appendix 1894 (b) (1)):

> "* * * In making and recommending individual and general adjustments to remove hardships or to correct other inequities, the Housing Expediter and the local boards shall observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a fair net operating income from such housing accommodations."

On May 3, 1949, effective retroactively to April 1, 1949, the Housing Expediter amended the Regulations pertaining to New York City by inserting provisions for increase of the maximum rent by the so-called "fair net operating income" formula (14 Federal Register 2234).

Under this new regulation, a landlord was enabled to obtain an increase in the authorized maximum rental where "net operating income from the building is less than a fair net operating income." It is not necessary to here dwell on the intricacies of the formula adopted by the Expediter except to note that in determining the "net operating income" the landlord could deduct, as an item of expense, a sum representing depreciation up to 16 per cent of the annual income in a building which contained five or more dwelling units.

The effect of this "guaranteed by tenant" return on fee value (as distinguished from investment or equity) was immediately felt in New York City, which, we think, may well be said to have a housing problem without parallel in the nation.

In August, 1949, the City Council, the New York City local legislative body, held public hearings which revealed that the new formula had brought about rent increases of as much as fifty per cent, that its application was causing great hardship and had created an emergency, which, unless alleviated, would bring about a chaotic eviction situation.

A local law (No. 73) to cope with the situation was eventually adopted and approved by the Mayor of the City of New York on October 7, 1949.

This local law, known, and to which we shall refer, as the Sharkey Law, declared the existence of a "serious emergency" in the City of New York by reason of the housing shortage "and by reason of demands for excessive rent increases which will cause wholesale evictions." It went on to declare that unless evictions were regulated, "serious threats to the health, safety and general welfare of the inhabitants of the city" will result and action by local law "is necessary to prevent wholesale evictions, chaos and confusion * * *." The policy of the City, as further declared in the law, was "to impose certain addi-

tional restrictions upon the right to evict tenants from apartments and to increase rents for apartments in the city, for the purpose of alleviating the present housing emergency and preventing abuses."

To further these purposes, the act made it unlawful for a landlord to attempt to collect a rental higher than that which he was receiving for the apartment on March 1, 1949 (that being the month immediately prior to the effective date of the "fair net operating income" formula) or to evict, for non-payment of rent, any tenant who continued to pay the same amount which was due and payable on March 1, 1949. Provision was made, however, for adjustments by a local rent commission.

The Sharkey Law was immediately subjected to attack on constitutional grounds. On December 29, 1949, the Court of Appeals, in *F. T. B. Corporation* v. *Goodman*, 300 N. Y. 140, held the local law to be invalid on the single ground (no others being considered) that in imposing additional restrictions on the right to evict, it in effect attempted to amend the state practice act and was beyond the power of the city under Home Rule provisions.

The first act of the State legislature which convened in January, 1950 was to legalize and validate the local law (Laws of 1950, ch. 1).

A legislative committee thereafter made a study of the entire rent situation in the State, and, on March 29, 1950, there came into being, as chapter 250 of the laws of 1950, the statute which is the subject of this petition.

The statute became effective, by its terms, on May 1, 1950. It froze rents at the figure prescribed by Federal law on March 1, 1950, except that in the City of New York, the maximum limited by the Sharkey Law was to prevail if it differed from the amount prescribed by the Federal law. This, of course, applied only to rentals due *after* May 1, 1950, and its constitutionality has been upheld by the Court of Appeals.

The rental situation in New York City was, however, still in a muddled state. After the Sharkey Law had been declared unconstitutional on procedural grounds and the State legislature had cured this defect by the original validating act, the law was again challenged in the courts. Its validity was sustained in *nisi prius* decisions, but as of May 1, 1950, pending appeals in the Court of Appeals had not as yet been decided. Through the months immediately preceding May, 1950, the Federal Housing Expediter, under the "formula," had authorized increases in maximum rent ceilings which affected some forty thousand families in New York City. The Sharkey Law forbade the collection of rents up to the limit of these ceilings and prevented the eviction of tenants who had not paid the differential. Thus, when the Legislature sought to clarify the rent situation and prevent the creation of a chaotic eviction situation, it came face to face with the confused picture in the City of New York, where, if the Sharkey Law were subsequently held to be unconstitutional, some forty thousand families faced the threat of being put out on the streets without any available shelter.

Section 13-a was enacted to cope with this situation. This section, although part of the general rent law, is sufficient unto itself. It contains a declaration of the legislative finding of emergency conditions and the steps deemed necessary to prevent and eradicate the evil.

Subdivision 1 sets forth a series of legislative findings, the highlights of which may be pin-pointed:

1. "* * * a substantial number of tenants * * * may be subject to potential liability arising from certain provisions of the federal * * * act * * * pursuant to which increases in maximum rentals were authorized * * *";

2. "an effort has been made to curb certain of such increases through the enactment of local laws which have been validated by state statute * * *";

3. "the validity of such local laws and state statute is presently the subject of litigation * * *";

4. "if such local laws or state statute are held to be invalid, wholly unexpected liabilities, substantial in amount and in some cases retroactive in operation will be imposed upon many tenants * * *";

5. "such claims will lead to evictions and create severe dislocation and hardship in many instances and engender uncertainty * * *";

6. "these occurrences would intensify the emergency arising from the acute shortage of dwellings * * *";

7. "such dislocation, hardship and uncertainty will interfere with the orderly regulation and control of residential rents * * *."

The subdivision concludes with a legislative finding that the foregoing "constitute a serious and substantial threat to the health, welfare and safety of the people of the state" and that remedial and corrective steps are necessary as an exercise of the police power.

Subdivision 2, which sets forth the steps taken by the Legislature to meet the inimical condition, is divided into two parts. Firstly, it is provided that no person shall be subject to liability for failure to pay an increase in rental authorized by the Federal Expediter, the collection of which was barred by local law, except where it is based upon an agreement for increase in space or services or was payable pursuant to an express written agreement.

As distinguished from this first part which deals with the personal liability of a tenant who has guided himself by the maximum rent restriction of the local law, the second part of the subdivision concerns itself only with preventing eviction, and provides that no court in the State shall have jurisdiction of any action instituted to recover

possession of real property because of the occupant's failure to pay the "increase."

Of the two remaining subdivisions of section 13-a, only the third is of substantive importance. Here it is provided that the section shall not be deemed to authorize a tenant to recover any rent which he has already paid prior to May 1, 1950.

The Court of Appeals has found both the local law and section 13-a, in its entirety, to be in conflict with the Federal Housing and Rent Act and hence violative of the Supremacy Clause.

The effect of this holding is to compel some forty thousand tenant-families in the City of New York to pay—at the pain of eviction, with no available apartments—retroactive rent increases running back for over a year in many cases. It has brought about the very situation which the Legislature declared, in enacting section 13-a, would "lead to evictions and create severe dislocation and hardship in many instances and engender uncertainty; * * * and that such dislocation, hardship and uncertainty will interfere with the orderly regulation and control of residential rents * * *"; all of which "constitute a serious and substantial threat to the health, welfare and safety of the people of the state."

Specification of Error

The Court of Appeals has erred in declaring the Sharkey Law, as validated by the State Legislature, and section 13-a of the Emergency Housing Rent Control Law of the State of New York, to be in conflict with the Federal Housing and Rent Act, and hence unconstitutional and invalid as violative of the Supremacy Clause of the Constitution of the United States.

The State Court did not strike the subject statutes as an improper exercise of the police power. On the contrary,

it specifically found, as respects section 13-a, that the issue was not one of reasonableness or of degree. The Court predicated its determination of invalidity upon the narrow ground that the increase in maximum rent authorized by the Federal Expediter imposed absolute liabilities upon the tenants to pay to the very limit of the ceiling and that the Supremacy Clause prohibited the State from either preventing collection of the increased sums or barring eviction therefor, whether during or subsequent to the existence of Federal controls in the State.

We think that the Court of Appeals has misinterpreted the true nature of the Expediter's adjustment of the maximum rents. But over and above this point, we submit that the Court erred in limiting the basis of its determination to this single issue. A far more vital question is involved, bearing directly upon the construction of the Supremacy Clause in the relation between the Federal and State governments and the reconciling of their oft conflicting interests.

Whatever the legal effect of the Expediter's orders may be, we urge that the Court of Appeals has erred in construing the Supremacy Clause as an absolute bar to the State's exercise of its police power in dealing with a local situation arising *after* the Federal government has expressly yielded the field to State control. To permit the ruling of the State court to stand is to say that with the Federal authorities out of the field, the State is nonetheless powerless to deal with a chaotic and dangerous local situation and that the peril to the health, welfare and safety of the citizens of the State must be permitted to continue unabated, regardless of the patent consequences. Such use of the Supremacy Clause is not only without basis in precedent or logic, but, we respectfully urge, undermines the very concept and purpose of democratic government in action for the protection of the safety and welfare of its citizens.

A.

The guiding rule for determining whether a state statute runs afoul of the Supremacy Clause was succinctly expressed by this Court in *Hines* v. *Davidowitz*, 312 U. S. 52 (1941), at page 67:

> "• • • This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. • • •"

The entire basis of the Court of Appeals' holding is dependent upon a finding that when Congress authorized the Expediter to fix, or to adjust, the maximum rent, it intended to thereby confer a vested right upon the landlord to receive, and the concomitant obligation upon the tenant to pay, that, and only that, amount as the rental.

We submit, and think we can clearly show, that such was not the intent, purpose or objective of Congress. Fixing of the maximum rent merely sets an upper limit. It does no more. In no way can the Housing and Rent Act, or the regulations issued thereunder, be read as saying that rents are *fixed* at the maximum level. They simply state that rents may not *exceed* that level.

The Federal Act is nothing more or less than a prohibition against demanding or accepting more than the maxi-

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The Federal Act is nothing more or less than a prohibition against demanding or accepting more than the maxi-

mum fixed by the Expediter—"* * * no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established * * *" (Housing and Rent Act, sec. 204(b)(1); 50 U. S. C. Appendix 1894 (b)(1)). The policy and objective of the Federal legislation is in no way defeated, or interfered with, if the landlord agrees to accept a lesser rent or if a local law prescribes additional limitations *within the Federal ceiling.*

That Congress intended the Federal Act to be nothing but a *restriction* upon the amount of rent which could be demanded, is made crystal clear by the declaration of policy contained in the Act itself (sec. 201(b); 50 U. S. C. Appendix 1891 (b)):

> "The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal *restrictions* on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain *restrictions* upon rents charged for rental housing accommodations in defense-rental areas. * * *"

The action of local authorities in placing a *lower* ceiling on rents cannot in any way be said to be "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz, supra*).

B.

Let us assume, *arguendo,* that the maximum rent fixed by the Expediter is the amount which the tenant is, *per se,*

obligated to pay. The Sharkey Law, though later declared unconstitutional, had for many months prior to May 1, 1950, directed the tenant to pay, and compelled the landlord to accept, a lesser amount. During the months of dual Federal-City control and the ensuing litigation, retroactive liabilities were piling up against thousands of tenants. Now, on May 1, 1950, the State, under authorization of the Federal government, takes over, exclusively, the entire field of rent control. In its wisdom, the State determines that to compel the tenants to pay these retroactive rent increases would create economic distress and evictions and would make proper regulation of dwelling rents and evictions impossible. Accordingly, the State, acting under its police power, wipes out these liabilities and prohibits evictions therefor. The issue then, is whether the Supremacy Clause was ever intended, or whether it may even literally be read, to prohibit such action under the police power. We think that only a negative answer can be made.

Neither property rights nor contract rights are absolute—both must give way to the proper exercise of the police power of the State. This principle is deep-rooted and firmly established. *Queenside Hills Realty Co.* v. *Saxl,* 328 U. S. 80 (1946); *Nebbia* v. *New York,* 291 U. S. 502 (1934); *Hadacheck* v. *Los Angeles,* 239 U. S. 394 (1915); *Barbier* v. *Connolly,* 113 U. S. 27, 31-32 (1885).

Contractual agreements between landlord and tenant give way to the retroactive exercise of the police power. *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170 (1921); *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242 (1922); *Twentieth Century Associates* v. *Waldman,* 294 N. Y. 571 (1945), appeal dismissed for want of a substantial federal question, 326 U. S. 697.

Needless to say, the Court of Appeals, in deciding the subject case, has recognized these well-settled principles dealing with the broad extent of the police power. The

distinction which the court has attempted to make is that these rights may not be affected by the police power simply because they were originally granted by the Federal government. The assumption is that if the landlord and tenant had voluntarily entered into an agreement for the payment of the higher rental, it could be voided by the State under its police power, but simply because the Federal government wrote the lease for the parties (and that is the best view, from the landlord's standpoint, which can be taken of the nature of the "right"), the agreement is put out of the reach of the police power.

We respectfully urge that the distinction is not only novel but without merit.

Section 13-a is closely analogous to, and, in truth, was drafted after the pattern of the Federal Portal-to-Portal Act of 1947 (U. S. Code, tit. 29, secs. 251, 252). That statute has been uniformly held constitutional (see *e. g., Battaglia* v. *General Motors Corp'n,* 169 F. 2d 254 (1948), cert. den. 335 U. S. 887).

The Portal-to-Portal Act retroactively wiped out employers' liability for preliminary activities by their employees. The distinction which the Court of Appeals has drawn is that there Congress was abolishing rights which it had granted, while here the State is wiping out rights which Congress had granted.

Here, again, we think the distinction is without substance. The question involved in both cases is not as to *who* originally created the right but rather whether it is a vested right subject to eradication by government action when necessary for the general welfare. Rights granted by government, we submit, have no greater inviolability in this respect than those obtained by private contract.

We respectfully urge that when the State, acting under Congressional authority, took over complete and exclusive control of the field, its power to deal with any and all

facets of the then existing rent situation, for the general welfare of its citizens, was in no way limited by the Supremacy Clause.

Conclusion

It is respectfully urged that the writ of certiorari should issue. The points involved are as novel as they are important. The issue is of vital interest to the economic well-being of approximately forty thousand tenant-families in New York City. The case presents a question which, in all probability, will arise time and again, where, as here, the Federal government, in time of war, has taken over a function normally lodged in, and eventually to be returned to, the exclusive control of the individual State.

The Court of Appeals has based its determination on a construction of a Federal statute and the Constitution of the United States. It should be reviewed by this Court.

Dated, New York, N. Y., September 14, 1950.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Attorney for the People of the State of New York,
Petitioner.

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EUGENE J. MORRIS
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

EDWIN H. STERN, JR.,

Petitioner,

—v.—

TEEVAL CO. INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE MUNICIPAL COURT OF THE CITY OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on July 11, 1950, upon remittitur to the Municipal Court of the City of New York.

Opinions Below

The opinion of the Municipal Court is reported in 96 N. Y. S. (2d) 859. The opinion of the Court of Appeals is reported in 301 N. Y. 346.

Jurisdiction

The jurisdiction of the Supreme Court to review this case is invoked under 28 U. S. C. Sec. 1257 (3).

The judgment of the Court of Appeals of the State of New York was entered in the case on July 11, 1950, and entered upon remittitur to the Municipal Court of the City of New York on the same date. The appeal was directly to the Court of Appeals on the ground that the only question involved was the validity of a state statute under the constitution.

The Federal question herein was initially raised in the complaint of Respondent Teeval Co., Inc. in the Municipal Court of the City of New York (See 19 (b) page 26 of record in the Court of Appeals). President Justice William Lyman of the Municipal Court (Record pages 43, 44) found no basis for a declaration of unconstitutionality, but the Court of Appeals assumed a contrary position, 301 N. Y. 346, 365-368. It is from this portion of the determination of the Court of Appeals that petitioner herein seeks relief.

Question Presented

Does Section 13-A of the New York State Emergency Rent Control Law (Laws of the State of New York 1950, Chapter 250), violate Article VI of the Constitution of the United States?

The pertinent statutory provisions are printed in the Appendix.

Statement

This is a test case involving the constitutionality of the New York State Emergency Rent Control Law (Laws of the State of New York 1950, Chapter 250). This statute was enacted to deal with the existing emergency housing situation in the State of New York. The opinion of the Court of Appeals sets forth the genesis, effect and manner of operation of the State Law.

Local Law 73 (commonly called the Sharkey Law) had previously been enacted by the City Council of the City of New York and became effective on October 7, 1949 at a time when the Federal Office of Housing Expediter supervised rent control under the provisions of the Federal Housing and Rent Act of 1947, as amended. The local legislation set up standards and machinery for fixing maximum rents in the New York City area within the ceilings allowed by the Federal Law and in instances where maximum rents were increased by the Federal authority, the Sharkey Law continued the former ceilings in effect subject to the right of the landlord to apply for an increase in the maximum under certain conditions prescribed in the Local Law.

The validity of the Sharkey Law was variously attacked in the New York courts but, before final determination by the Court of Appeals, the New York State Emergency Rent Control Law (Chapter 250 of the Laws of 1950) was enacted terminating and superseding Federal control within New York State in accordance with Section 204 (j) of the Federal Housing and Rent Act of 1947, as amended.

The State Law became effective on May 1, 1950 and continued maximum rents at the levels fixed by the Sharkey Law. Section 13A of the State Law perpetuated the Sharkey Law bar to the collection by landlords of the permissive increases in ceilings granted by the Federal Housing Expediter for the period preceding May 1, 1950. Upon the enactment of the new statute, the New York Court of Appeals directed reargument of all cases challenging the validity of the Sharkey Law and placed these cases on for argument at the same time as the instant case which challenged the validity of the new State Rent Control Law which became effective on May 1, 1950. The determination of the Court of Appeals in this and the companion cases

decided at the same time (*F. T. B. Realty Corp.* v. *Louis Goodman; Leon Leighton, et al.* v. *Jawrower,* No. 1, No. 2; *Bordo Corp.* v. *Witty; Iscovitz* v. *Paletta*); struck down the Sharkey Law and declared invalid Section 13-A of the State Emergency Rent Law as repugnant to Federal Law and hence in violation of the Supremacy Clause of the Federal Constitution. In every other respect the court below upheld the constitutionality of the provisions of the New York State Emergency Housing Rent Control Law.

When the Sharkey Law and Section 13-A were declared invalid, increases in rent ceilings affecting from 40,000 to 50,000 tenants in New York City became payable immediately. These increases, dating back as much as a year, amounted to substantial sums and in many cases affected persons of small means. Accordingly, application was immediately made to the Chief Judge of the New York Court of Appeals for a stay of execution of its order. This was refused on July 12, 1950 and application was thereupon made to this Court by counsel representing the tenant and opposed by counsel for the landlord in this test case for a stay of execution of the order. The stay was granted by Mr. Justice Jackson by order dated August 14, 1950 which provided as follows:

ORDER

> This matter came on for hearing upon the written applications of counsel for petitioners and opposition thereto by counsel for respondents, and it appearing that there is presented a question of conflict between State and Federal Authority which will require settlement by this Court,

It is ordered that execution and enforcement of the remittiturs of the Court of Appeals of the State of New York in these cases be, and the same is hereby, stayed pending the filing and disposition of petitions for writs of certiorari to review the judgments herein, provided the said petitions are filed within the time fixed by law.

In the event certiorari is granted then the stays are to continue until the mandates of this Court issue.

Dated this 14th day
of August, 1950.

Robert H. Jackson
Associate Justice of the Supreme Court of the United States.

On August 16, 1950 counsel for the landlord in this test case applied for a modification of the above order to provide for the posting of a bond or other security as a condition of the stay. Opposed by counsel for the tenant, on August 23, 1950 this application was denied by Mr. Justice Jackson.

Specification of Errors

In declaring that Section 13A of the New York State Rent Control Act abrogated rights created by Congress and was, therefore, repugnant to the Supremacy Clause of the Federal Constitution, the Court of Appeals erred in the following respects:

1. Under the provisions of the Federal Housing and Rent Act in general and Section 204b in particular, the

increases in maximum rents allowed by the Federal authorities were solely permissive and did not create any rights or confer any mandates directing payment of the increases which, if barred by a state, would give rise to conflict.

2. In any event, since Federal authority in the field of rent control was relinquished to New York State pursuant to Section 204j of the Federal Act, Section 13A can involve no question of conflict since it does not operate retroactively but only became effective after May 1, 1950, the date of Federal relinquishment and State assumption of authority.

3. The provisions of Section 13a are not in conflict with Section 204(f) of the Federal statute.

Reasons for Granting the Writ

1. *The Federal Housing and Rent Act in general and Section 204b in particular establish maximum rents only and do not bar a state from fixing lower ceilings.*

The holding of the New York Court of Appeals that the Sharkey Law and Section 13A are attempts to abrogate rights created by Congress, misconceives the design and purpose of the Federal Housing and Rent Act and the specific language of Section 204b in particular (Section 204b is quoted at p. 25, Appendix).

The relevant portions of Section 204b provide that: "no person shall demand, accept or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established * * *" as prescribed in the Act. Thus, the Federal authority is exclusively addressed to the formulation of maximum rentals representing the ceilings or upper limits which rentals may

not exceed and no other rights are thereby created nor are other mandates thereby conferred by Congress. Indeed, the nature of the emergency dealt with by this particular rent regulation and the traditional delineation of Federal and State jurisdiction in this field require no further prescription by Congress beyond the establishment of maximum rentals.

The emergency which evoked the Federal Housing and Rent Act is the war-engendered and post-war nurtured shortage in rental housing and Federal concern with the situation has been consistently directed to holding a lid on rents in order to curb inflation and to permit the most efficient use of the nation's housing resources. Nothing in the situation calls for a floor under rentals or for a mandate compelling the payment of any minimum. The acute shortage itself provides the most potent guarantee of the payment of minimum amounts without any necessity on the part of Congress to direct their enforcement. Quite to the contrary, the Federal anti-inflation objective relating to rents is to fix by statutory formula certain maximum amounts which no State or local agency may flout by allowing rents in excess of these amounts and it is in this sole regard that Congress has expressly preempted the field of rent control. However, beyond this point of creating machinery and formulas for fixing maximum rentals, Congress has not preempted the field of rent control. It does not appear by express language that it has done so and necessary implication leads to precisely the opposite conclusion.

The limited nature of Congress' activities is shown not only by the explicit language of the statute and the needs of the situation it was designed to meet, but by the traditional relationship between state and federal authority where the exercise of police power is involved. The police power to deal with emergencies of this type is securely reposed in

the several states by the Tenth Amendment and the Courts have been assiduous in keeping it there. *Missouri, K & T. R. Co.* v. *Haber,* 169 U. S. 613; *R. F. C.* v. *Central Republic Trust Co.,* 17 Fed. Supp. 263; aff'd sub nom. *R. F. C.* v. *McCormick,* 102 Fed. 2nd, 305 cert. den. 308 U. S. 558; *Sinnot* v. *Davenport,* 22 How. 227; See *Carey* v. *South Dakota,* 250 U. S. 118; *Savage* v. *Jones,* 225 U. S. 501. Thus, short of categoric prescription by Congress in *haec verba* it may not be implied. *Reid* v. *Colorado,* 187 U. S. 137, 148; *Missouri K & T. R. Co.* v. *Harris,* 234 U. S. 412, 418, 419; *Allen Bradley Local* v. *Board,* 315 U. S. 740, 749; *Matter of Davega City Radio Inc.* v. *State Labor Relations Board,* 281 N. Y. 13. It is the announced policy of Congress that the exercise of power in rent matters is traditionally within the control of the several states and that Federal control of rents is borne and exercised solely by virtue of the war power and then only to the extent that it is specifically pre-empted. *Bowles* v. *Willingham,* 321 U. S. 503. A lowering of the rent ceiling by a local authority does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Bethlehem Steel Corp.* v. *N. Y. Labor Relations Board,* 330 U. S. 767, 773) but, rather, as the proper exercise of the State's responsibility and authority to deal effectively with specific local needs or situations within the area remaining to it. *Veix* v. *6th Ward Ass'n,* 310 U. S. 32; *East N. Y. Savings Bank* v. *Hahn,* 326 U. S. 320; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Hill Packing Co.* v. *City of N. Y.,* 295 N. Y. 527; *Durham* v. *La Fetra,* 230 N. Y. 429; *So. Pacific Co.* v. *Arizona,* 325 U. S. 761.

Yet, it appears to be the assumption of the Court of Appeals that in setting a maximum rent Congress confers a right or mandate to collect it and that the ceiling over rentals thereby becomes a floor under rentals. (See opinion

below 301 N. Y. 346 at 365-368.) Without proceeding on this assumption, the Court of Appeals could not have found the Sharkey Law and Section 13A bad, since these statutes did no more than to regulate rents within the framework set by the Federal law (*i.e.* at or below the Federally determined maximum).

Underlying this supposition of the Court of Appeals is an error which is at once literal and conceptual and which reference to the language of Section 204b of the Act plainly exposes. The statute bars rents "greater than the maximum rent" and only an interlarding of this language to make it read "greater or less than the maximum rent" can conceivably extend it into providing that the ceiling over rentals is also a floor under them or is a "rent-fixing" as the Court of Appeals calls it (301 N. Y. 346, 365). That Congress neither intended nor implied any such interpolation is shown by the fact that where it has desired to establish a legal minimum as well as a legal maximum, it has expressly done so (see *e.g., Fair Labor Standards Act,* 52 Stat. 1060-1069, 29 U. S. C. 201-219; *Milk Marketing Statute,* 50 Stat. 246, 7 U. S. C. 601 *et seq.; Guffey Coal Act,* 49 Stat. 991). In this instance, however, Congress has declared only that the collection of rents equal to or less than the ceiling is not prohibited under Federal Law. The extensive regulations, issued under authority of the Act, do no more than deal with the fixing or modifying of a maximum rent (see *e.g.,* hardship basis, Federal Regulation 5a12; comparability basis, Federal Regulation 5a11; increased services basis, Federal Regulation 5a3; fair net operating formula basis, 5a18) and do not authorize increases in rent. To overlook that context throws the entire concept of the Federal Statute out of focus and results in a picture distorted into one of increases rather than establishment of ceilings. Yet it is the conceptual error of the

Court of Appeals that these new or raised ceilings constitute increases; dollar-and-cents awards which confer rights or mandates on landlords to collect to the exclusion of a State's traditional right to modify these ceilings downward under appropriate circumstances. (See the reference by the Court of Appeals to them as "rent increases granted by the Federal Housing Expediter" 301 N. Y. 346 at 357.) In all likelihood, this error grows out of the fact that the continuing shortage has, in practically all cases, caused the rents actually charged to be identical with the maximum that could be charged. Thus, current concern is largely with modifying those ceilings upward. The talk in Congressional debates and in presentations to the Expediter is of "increases"; the regulations speak extensively of "increases" and how to obtain them; the applications of landlords are for "increases"; the law is amended to permit more "increases". But all these "increases" modify the words "maximum rent established" and derive their meaning through them and, therefore, are merely new amounts which may not be exceeded.

It was clearly erroneous for the Court of Appeals to perceive orders setting Federal maximum rents as creating claims for "rent that have accrued by operation of an Act of the Congress * * *" (301 N. Y. 346, 365) or to view the receipt of such orders as creating a property right or interest immune from any exercise of police power by the states within the limits of the maximum fixed by Federal Authority. Logically extended such an interpretation might well make it illegal for a landlord and tenant to agree on a rent below the maximum.

Its error in this regard requires a determination of whether Section 204b of the Federal Statute creates maximum rentals only and accords to state or local authority the power to create lower ceilings by enacting a Sharkey

Law or a Section 13-A, or whether the language of Section 204b is to be construed, as the Court of Appeals has read it, to establish both a ceiling and a floor for rentals.

The importance of this issue is not limited to this case or to the 40,000 to 50,000 tenants affected by a determination of this test case nor even to the State of New York alone but applies to every state in the Union. If, as the Court of Appeals, in effect, has held, Section 204b establishes minimum rents as well as maximum rents, then any further action by the New York State Legislature and Courts will be accordingly circumscribed and the legislatures and courts of other states may be accordingly influenced unless a review is granted by this Court to settle the issue. See *Patterson* v. *Lamb*, 329 U. S. 539.

2. *There can be no conflict in view of the relinquishment of Federal Authority to New York State under Section 204j of the Federal Housing and Rent Act.*

Even if Federal rights (as the Court of Appeals viewed them) had been involved, there can be no question of conflict with respect to Section 13A after May 1, 1950, the date on which New York State assumed full authority over the field of rent control in accordance with the relinquishment provisions of Section 204j of the Federal Act.

(a) The Court of Appeals, in an arbitrary divorcement of Section 13A from the remainder of the New York State Rent Control Law which it validated, has sought to limit the meaning and application of Section 204j. That section permits the state to terminate Federal control completely and substitute its own controls (Section 204j is quoted at p. 26 of Appendix).

In dealing with the prospective provisions of the New York State Rent Law, the Court of Appeals stated in this case in 301 N. Y. 346 at page 361:

"But the 1949 Federal Housing Act contemplated freedom of a State to supplant Federal control of rents with regulation of its own design. To that end, the Federal Act declares" (Quoting the Section 204j).

"By the foregoing declaration Congress expressed it willingness to withdraw from the field of rent control in the States and to permit them to occupy that field. On the strength of that declaration, the Legislature of this State passed the State rent control Statute here in question in the exercise of the inherent police power reserved to the State itself by the Tenth Amendment of the Federal Constitution (See People ex rel. Durham Realty Corp. v. LaFetra, 230 N. Y. 429, 442-443).

The State rent control statute reveals the dissatisfaction of the Legislature with some of the results of the former Federal process of rent control (l. 1950, ch. 250, Section 1) and the apprehension of the Legislature lest the rent increases that were being granted by the Federal Housing Expediter would intensify the emergency arising from the acute shortage of dwellings in the City of New York (Section 13-a). The Legislature, then, had reasons of its own for not following more closely than it did the pattern of the Federal system of rent control and, this being so, it is not for this Court to say that the Legislature was bound to take a different course (See Lapchak v. Baker, 298 N. Y. 89, 95 and cases there cited)."

However, in contravention of its clearly correct analysis of the provisions of Section 204j the Court of Appeals elected to excise Section 13A from the remainder of the Statute and held that, as to it, the sanction given to a State

to take over control on its own terms did not apply. This conclusion, it would appear, is erroneous. There is no essential difference in the provisions of Section 13A and those of the remainder of the Act. While Section 13A deals only with increases in Federal maximum rents allowed during a period when the Federal Housing and Rent Act was actually in operation in the New York area, it did no more than maintain the status quo as it existed on May 1, 1950, the date upon which the State Rent Control Law became operative. Although in some instances new maximum rents had been authorized by the Housing Expediter under the Federal Act for varying periods prior to May 1, 1950, none of these increases was paid by tenants or collected by landlords in view of the bar created by the Sharkey Law which prohibited the collection of these increases, and, in fact, rendered the collection of them subject to criminal penalty. Thus, the permissive increases in the ceiling allowed by the Housing Expediter constituted no more than paper orders insofar as the landlords and tenants were concerned since the higher amounts were actually rendered uncollectible by local law prior to May 1, 1950 and on that date they were, in fact, no different than new rentals accruing after May 1, 1950. The subsequent (July 11, 1950) invalidation by the Court of Appeals of the bar furnished by the Sharkey Law to the collection of these rents had no effect upon the actual situation which existed on May 1, 1950, which was the main concern of the State in exercising its police power through Section 13A. For whether or not the Sharkey Law was invalid, its existence had resulted in a situation which the Legislature could not ignore. "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374.

Section 13A is indivisible from the whole of the New York State Rent Law. It did no more than the rest of the act in regulating rents after May 1, 1950. The increases unpaid on May 1, 1950, were (as we have shown) as much a part of the rent situation governed by the new State Rent Law as the unpaid May 1950 rent which the Court of Appeals held was fully protected by the State Law. The arbitrary segregation of the two parts could only have proceeded from a basic misconception of the import of the entire act and the effect of Section 204j upon the State's power to act.

Section 13A was created by the State Legislature by virtue of its police power and deals with a specific problem in New York City which affects approximately 45,000 tenants. In consideration of the number of people affected and the gravity of the situation, the State Legislature made a separate declaration of emergency, but Section 13A is nevertheless integral to the over-all plan of dealing effectively with the total emergency situation in housing and rent as it existed in New York State on May 1, 1950. Section 13A derives its sanction from the same source as the remainder of the State Law; it is just as much "an expression of dissatisfaction of the Legislature with some of the results of the former process of Federal Rent Control" (301 N. Y. 346 at 361); and its operation upon the rent situation is just as free from conflict with the Federal Statute.

The invalidation of Section 13A by the Court of Appeals imposes crippling restrictions upon the application and operation of Section 204j which will arise again and again to plague the houses of the legislatures of each of the several states when they are ready to take over the field of rent control. This attempt by the court below to limit Section 204j beyond the plain meaning of its own language will seriously contract and impair the power of the states

to act in this field of rent control by depriving them of the flexibility and discretionary judgment vital to an effective exercise of their police powers.

(b) Section 13A derives its basic concept from the Federal Portal-to-Portal Act of 1947, 61 Stat. 84-90, 29 U. S. C. Sections 251-262 and is in close parallel to it. There is apparent acceptance by the Court of Appeals that the declaration of emergency and the provisions of Section 13A have been drafted after the pattern of the Portal-to-Portal Act and that "this statute has been uniformly held constitutional" (301 N. Y. 346, 367). The court below would seem to agree that if the so-called rights given by the Federal increases in setting maximum rentals had been abolished by Congress, there would be no question of constitutionality. But in the opinion of the court below, 301 N. Y. 346 at page 367, "there is an essential difference between abolition by Congress of rights created by it and an attempt by a State to abolish such rights."

Once again, the core of the issue is a proper interpretation of and regard for the relinquishment provisions of Section 204j of the Federal Statute. If the function of 204j is, as its language indicates, to remove completely any preemption previously effected by Congress then the states are not only restored to their former supremacy in the field but are accorded as a necessary incident thereto the right to act as Congress could have continued to act, had it elected to remain in the field. Included, as the Court of Appeals seems to agree Congress could have done, is the right to abolish increases in ceilings previously granted.

It has been urged by counsel for the landlord that in the Portal-to-Portal Act Congress merely took away something it had by legislative fiat created, whereas in this case Section 13A constitutes a bar retroactively to vested rights.

This asserted difference is relied upon to overcome the compelling force of the comparable basic rationale from which the two statutes proceed. However, as established in Point "1" above the Sharkey Law validly intervened and prevented the parties from contracting at the increased maximum by creating a binding maximum rent below the Federal ceiling and this bar to the collection of the higher amount effectively foreclosed the creation of any rights which would be immune from impairment by Section 13A.

But even if this were not so, Section 13A does not interfere retroactively with any vested rights. The Section does not purport to reach back beyond the period of May 1, 1950, but, rather, deals only with the situation covering accruals as they existed on May 1, 1950 and the prospective treatment of them. Neither Section 13A nor any other part of the Emergency Rent Law, for that matter, interferes with or affects in any way the relationship between any landlord and tenant which was consummated prior to May 1, 1950. It does deal with the payment and amount of rentals *in futuro, i.e.,* subsequent to May 1, 1950. Thus, if under a particular set of facts a landlord and tenant had entered into an arrangement whereby the tenant had paid a rent in excess of the amount fixed by the State Rent Law for the period prior to May 1, 1950, the State Law does not purport to reach back and modify the rights of the parties for that retroactive period. However, where the rents were not paid the State Law decrees that the landlord cannot after May 1, 1950 go in and collect the higher rent. The error of the Court below is in dealing with this provision as modifying, affecting or abridging the provisions of the Federal Laws which clearly it does not do. The Federal Laws under Section 204j ceased to operate on May 1, 1950 and thereafter.

This Court in *Fleming* v. *Rhodes,* 331 U. S. 100 (also a rent control case) held that such prospective operation of a

statute even where dealing with so called "rights" previously created did not go beyond the power of Congress to control. At page 107 the Court stated:

> "The effort of the Appellant is to enjoin future proceedings for eviction after the acquisition by the landlord appellees through valid judgments of what the district court characterized as "vested rights". Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with acquired rights does not condemn it." (See also *Hadacheck* v. *Los Angeles*, 239 U. S. 394.)

Moreover just as such "vested rights" are not beyond the power of Congress to control, they are similarly within the province of a proper exercise of the police power by a state.

> *Block* v. *Hirsch*, 256 U. S. 135;
> *East N. Y. Savings Bank* v. *Hahn, supra;*
> *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398;
> *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242.

As we have already noted, Section 13A was made under a separate declaration of emergency and if we are properly to recognize "the cumulative significance that each" part of the State Law "imparts to all" (*Worthen* v. *Kavanagh*, 295 U. S. 56), then it must follow that the provisions of this section represent a perfectly competent and valid exercise of the police power on a specific problem. Reference to the declaration of emergency of Section 13A must clearly establish that the State properly concerned itself, not with

the factors which brought the critical situation about but, rather, with the curative measures to be administered from May 1, 1950 and thereafter.

Durham v. *LaFetra*, 230 N. Y. 429 at page 448;
Miller v. *Schoene*, 276 U. S. 272, 279, 280.

In fields which are traditionally under local regulation, such regulation is considered valid unless it expressly appears that Congress meant to withdraw the subject from local control. In the instant situation, Section 204j expressly yields the field of rent control to the states and the arbitrary separation of one of the parts of the State Law, enacted under a proper exercise of its police power, represents an unwarranted limitation of the plain language of the Statute.

The effect of the interpretation placed upon Section 204j by the Court of Appeals in this case is to limit and seriously impair its operation. It has here held, in effect, that states may use Section 204j but only within certain circumscribed limits. Thus, even where a state complies fully with Section 204j, it may not take over full control from a certain date forward where its control might affect items dealt with in the prior Federal control in a different manner. The restriction thus imposed is not easily delimited and if allowed to stand will render uncertain the effect of Section 204j upon each state seeking to avail itself of the privileges thereby accorded to it by Congress. The issue created by the determination of the court below is of sufficient importance to require settlement by this Court. See *U. S.* v. *Ruzicka*, 329 U. S. 287. *Rothensies* v. *Electric Battery Co.*, 329 U. S. 296.

3. The provisions of Section 13A are not in conflict with Section 204f of the Federal statute.

It is contended by counsel urging the invalidity of Section 13A that its provisions conflict with Section 204f of the Federal Housing and Rent Act (the section is quoted at p. 26, Appendix).

Section 204f is, however, inapplicable here for the identical reasons urged in Point "1" *supra, i.e.,* the Federal Rent Act deals with fixing maximum rents only and there is nothing in Section 13A which violates those ceilings. If Section 13A were to decree that for the month of April, 1950 a landlord is entitled to collect a rent in excess of the Federal rent ceiling and authorized him to do so after May 1, 1950 (the effective date of Section 13A) that might well run afoul of Section 204f and could thereby create a conflict carrying fatal consequences for the offending State Law. But as long as Section 13A deals with rents within the Federal ceilings, it cannot be affected by Section 204f.

In any event, however, Section 204f by its own language does not apply when there has been accomplished the full relinquishment of authority to a state under Section 204j. The contingencies, rendering the Section operative are spelled out in detail but it is silent on the question of termination of Federal control under Section 204j. It may only be concluded that Congress intended Section 204j to govern these situations exclusively. "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." *Reid* v. *Colorado, supra.*

Section 204j manifests without qualification that the purpose of Congress was to vest the States with full power to

administer the situation as they saw fit without fettering its operation with restrictions and limitations carrying over from the former control. *Matter of Tartaglia,* 297 N. Y. 419; *People* v. *Mailman,* 182 Misc. 370, aff'd 293 N. Y. 887; See *Gilbert* v. *Minnesota,* 254 U. S. 325. If, however, Congress intended otherwise (as has been urged in this case) then this issue of the intent and effect of Section 204f is of vital significance to the entire country and any doubt as to its true import should also be resolved by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Eugene J. Morris,
Counsel for Petitioner.

September 11, 1950.

APPENDIX

Statutory Provisions

1. New York State Emergency Housing Rent Control Law of 1950, Chapter 250, Laws of New York, 1950.

* * * * *

Section 1. Declaration and findings; termination. 1. The legislature hereby finds that a serious public emergency exists in the housing of a considerable number of persons in the state of New York which emergency has been created by war, the effects of war and the aftermath of hostilities; that such emergency has necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings as a result of the diversion and reservation of essential materials and manpower needed to prosecute the war; that the federal law pursuant to which rents of dwellings are presently being regulated and controlled, by its terms expires on the thirtieth day of June, nineteen hundred fifty; that such law provides for an optional system of state regulation; that unless residential rents are regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the legislature is imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health; that there has been variation in federal law and regulations from year to year

and duality of control by federal and city government resulting in uncertainty and insecurity on the part of both landlord and tenant; that the avoidance of further vacillation and confusion necessitates careful and deliberate study of the factors affecting the rental market and rents prior to the promulgation of regulations; that the transition from regulation to a normal market of free bargaining between landlord and tenant should be restored as expeditiously as possible; that in order to prevent uncertainty, hardship and dislocation, the provisions of this act are declared to be necessary and designed to protect the public health, safety and general welfare.

* * * * *

§13-a. 1. The legislature hereby finds that a substantial number of tenants in this state may be subject to potential liability arising from certain provisions of the federal housing and rent act of nineteen hundred forty-seven, as amended, pursuant to which increases in maximum rentals were authorized; that an effort has been made to curb certain of such increases through the enactment of local laws which have been validated by state statute; that the validity of such local laws and state statute is presently the subject of litigation; that if such local laws or state statute are held to be invalid, wholly unexpected liabilities, substantial in amount and in some cases retroactive in operation will be imposed upon many tenants; that such claims will lead to evictions and create severe dislocation and hardship in many instances and engender uncertainty; that these occurrences would intensify the emergency arising from the acute shortage of dwellings; that pursuant to the federal housing and rent act of nineteen hundred forty-seven as amended, enactment into law of this chapter, will supplant federal controls with state controls; and that such

dislocation, hardship and uncertainty will interfere with the orderly regulation and control of residential rents contemplated by the re-enactment of this act. The legislature finds that all of the foregoing facts constitute a serious and substantial threat to the health, welfare and safety of the people of the state and enacts the following provision as an exercise of its police power.

2. No person shall be subject to liability in any action or proceeding commenced prior to or on or after the date this subdivision takes effect on account of the failure of such person to pay an increase in rental authorized by any order made by the federal housing expediter between March first, nineteen hundred forty-nine and the date this section takes effect, pursuant to the federal housing and rent act of nineteen hundred forty-seven, as amended, the collection of which was barred or purportedly barred by any local law enacted by the local legislative body, the board of estimate and the mayor of the city of New York and specified in chapter one of the laws of nineteen hundred fifty, except where such an increase is or has been:

(a) authorized pursuant to the provisions of paragraph (a) of subdivision one of section four hereof;

(b) approved prior to the time this section takes effect pursuant to such local laws; or is

(c) compensable pursuant to an express provision of a written rental agreement in effect at the time such increase was granted or prior to the time this subdivision takes effect.

No court of this state, or of any municipality, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the time this subdivision takes effect,

to accord any remedy for the recovery of real property or for the possession thereof, for or on account of the failure of any person to pay any such increase, to the extent that such action or proceeding seeks to enforce any liability or a remedy with respect to any such increase other than those specified in subparagraphs (a), (b) and (c) of the preceding paragraph of this subdivision.

3. Nothing herein shall be construed, however, to authorize recovery of any such increase paid pursuant to any such order prior to the effective date of this subdivision.

4. Notwithstanding any inconsistent provision of law, if any law which purports to control rents or evictions shall hereafter be held invalid or unconstitutional in whole or part, no action or proceeding for the collection of rent or for the recovery of real property or for the possession thereof, which was previously regulated, barred or limited in any way by such law, shall be commenced in any court until thirty days have elapsed from the date of the final judgment or order holding such law invalid or unconstitutional in whole or part. With respect to any such action or proceeding commenced prior to, and not reduced to final judgment on or before the date of such adjudication of invalidity or unconstitutionality, entry of judgment in favor of the plaintiff shall be deferred for a like period upon motion of any party.

* * * * *

2. Housing and Rent Act of 1949, 61 Stat. 193, 50 U. S. Code 1881-1902.

Sec. 204. * * *

["Fair Net Operating Income"]

(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, and subsections (h) and (i), during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no persons shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title: *Provided, however,* That the landlord certifies that he is maintaining all services furnished as of the date determining the maximum rent and that he will continue to maintain such services so long as the adjustment in such maximum rent which may be granted continues in effect. In making and recommending individual and general adjustments to remove hardships or to correct other inequities, the Housing Expediter and the local boards shall observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a fair net operating income from such housing accommodations. In determining whether the maximum rent for controlled housing accommodations yields a fair net operating income from such housing accommodations, due consideration shall be given to the following among other relevant factors: (A) Increases in property taxes; (B) unavoidable in-

creases in operating and maintenance expenses; (C) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement, and maintenance; (D) increases or decreases in living space, services, furniture, furnishings, or equipment; and (E) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement, or maintenance.

* * * * *

(f) The provisions of this title shall cease to be in effect at the close of June 30, 1950, or upon the date of a proclamation by the President or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this title is not necessary because of the existence of an emergency, whichever date is the earlier; except that as to rights or liabilities incurred prior to such termination date, the provisions of this title and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any such right or liability. [61 Stat. 199, as amended by Act of Feb. 27, 1948, Pub. L. 422, 80th Cong., 2d Sess.; Act of Mar. 30, 1948, Pub. L. 464, 80th Cong., 2d Sess., 50 U. S. Code App. Sec. 1894(f), and by the Housing and Rent Act of 1949.]

* * * * *

(j) (1) Whenever the governor of any State advises the Housing Expediter that the legislature of such State has adequately provided for the establishment and maintenance of maximum rents, or has specifically expressed its intent that State rent control shall be in lieu of Federal rent control, with respect to housing accommodations within defense-rental areas in such State and of the date on which such State rent control will become effective, the

Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this Act, as amended, with respect to housing accommodations within such State shall be terminated as of the date on which State rent control is to become effective. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(2) If any State by law declares that Federal rent control is no longer necessary in such State or any part thereof and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this act, as amended, with respect to housing accommodations within such State or part thereof shall be terminated on the fifteenth day after receipt of such advice. As used in this subsection the term "State" means any State, Territory, or possession of the United States.

(3) The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village: *Provided, however,* That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter: *And provided further,* That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area. [(j) added by 1949 Housing and Rent Act.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

MORRIS JAWROWER, Petitioner, against LEON LEIGHTON, etc., Respondent.	Cause No. 1.
MORRIS JAWROWER, Petitioner, against LEON LEIGHTON, etc., Respondent.	Cause No. 2

PETITION OF MORRIS JAWROWER FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Morris Jawrower respectfully prays for the issuance of a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, the highest court of the state, in which judgment that Court determined and declared New York City Local Law 73-1949, as validated by Chapter 1 of the Laws of the State of New York—1950, and Section 13-a of the Emergency Housing Rent Control Law of the State of New York (Laws 1950, ch. 250) to be in conflict with the Federal Housing and Rent Act of 1949 (Housing and Rent Act of 1947, as amended, 50

U. S. C. App. §§ 1881 et seq.), and as a consequence thereof unconstitutional and invalid as being violative of the Supremacy Clause (Article VI) of the Constitution of the United States. It is respectfully prayed that this petition be deemed to apply to both causes herein.

Nature of the Matter

In Cause No. 1, the respondent, a landlord of certain residential accommodations located in the New York City Defense Rental area, filed a petition with the Office of Housing Expediter for an upwards adjustment of the then existing maximum rents on the housing accommodations owned by it.

Pursuant to the Federal Housing and Rent Act of 1949 (supra), the maximum rent of petitioner's accommodations was adjusted upwards by order dated July 8, 1949 from $39 per month (the maximum rent on March 1, 1949) to $40.32, effective November 15, 1948, that being the date of the filing of landlord's petition (R. p. 13). The landlord, asserting that the New York City Local Law 73 was unconstitutional, brought a summary non-payment eviction proceeding to recover for February, 1950 a rent equal to the newly established federal maximum rent for said month, as well as the difference between the previously existing maximum and the adjusted maximum for prior months to November, 1948. The landlord did not apply for or obtain the certification referred to in the Local Law that the said higher rent was just and reasonable. The Court of Appeals viewed the legislation as being "* * * at war with Article VI of the Federal Constitution * * *" (301 N. Y. 346, 365).

Cause No. 2 was an action at law commenced to recover for the months of March and April, 1950 the difference between the regular rent and that resulting from the adjusted maximum rent by virtue of the order issued by the Federal Rent Agency, together with the full increased rent

for the month of May, 1950. With respect to the increased rent sought to be recovered for the months of March and April, 1950, Local Law 73, which had been asserted as a legal impediment to the receipt thereof, was stricken down by the Court, as noted above. Commencing May 1, 1950 the New York State rent control statute became effective. Section 13-a of said statute prohibited the institution of actions in its courts, to recover increases in maximum rents authorized by Federal orders issued between March 1, 1949 and May 1, 1950. The New York Court of Appeals likewise viewed this section as being in conflict with the Federal rent statute and violative of the supremacy clause (301 N. Y. 346, 367).

Jurisdiction

The jurisdiction of the Supreme Court is invoked pursuant to Section 28, U. S. C., Section 1257(3).

The determinations here sought to be reviewed are final judgments of the highest court of the State of New York. The appeal in each cause was direct to the Court of Appeals from the Municipal Court of the City of New York on the constitutional questions raised in the nisi prius court (New York Civil Practice Act, Sec. 588, Subd. 4). The only question involved in Cause No. 1 was the validity of the New York City Local Law 73 of 1949 as validated by Chapter I of the Laws of 1950, New York State, under the Constitution of the State of New York and of the United States. In Cause No. 2 the only questions involved were the validity of the New York State Emergency Housing Rent Control Law, a state statute, and the validity of the New York City Local Law 73—1949 (New York Civil Practice Act, Sec. 588, Subd. 4).

In the first cause the constitutional question was raised in the Municipal Court by the respondent in its petition in the summary proceedings. Respondent asserted that said New York City Local Law 73 of the year 1949 was in conflict with the Federal Housing and Rent Act of 1949

and contrary to Article VI of the Constitution of the United States (R. p. 17)* and the court of first instance took note of the constitutional question (R. p. 21) and reached the same in passing upon the issue (R. p. 23). In dismissing the respondent's petition, the Municipal Court passed on the constitutional question and upheld the constitutionality of New York City Local Law #73 (R. p. 26) as not in conflict with the Federal statute and constitution. By virtue of the nature of the appeal (C. P. A., § 588(4)), the Court of Appeals could and did consider only the constitutional question, but arrived at a contrary determination. It held that the Local Law 73 was in conflict with the Federal Housing and Rent Act and contrary to Article VI of the Constitution of the United States (301 N. Y. 346, 365).

Cause No. 2, in addition to raising the constitutional validity of the aforesaid New York City Local Law 73—1949, raised the constitutional validity of Section 13-a of the New York State Emergency Rent Control Law (Laws 1950, ch. 250). This was raised in the Municipal Court by an allegation to that effect in the complaint (R. p. 15) for arrears of rent claimed to be due under the federal rent statute and in accordance with the federal administrative order adjusting the maximum rent. The complaint was dismissed in the Municipal Court, the order of dismissal noting that the complaint demanded rent higher than that permitted by the said New York State Emergency Housing Rent Control Act (Section 13-a) and Local Law 73—1949 (R. p. 6). The Court of Appeals reversed the Municipal Court solely on constitutional grounds and held, as in the first cause, that the said New York City Local Law 73—1949 was in conflict with the Federal Housing and Rent Act of 1949, and as a consequence in violation of Article VI of the United States Constitution. The Court of Appeals further determined that Section 13-a of the New York State Emergency Housing Rent Control Law was also in con-

* All page references to the record are to the printed record as filed in the New York Court of Appeals.

flict with the said Housing and Rent Act of 1949, and in violation of Article VI of the United States Constitution (301 N. Y. 346, 367, R. p. 42).

Questions Presented

Cause No. 1

Is Local Law 73—1949 of the City of New York as validated by the Laws of 1950, Chapter I, in conflict with the Federal Housing and Rent Act of 1949, and violative of Article VI of the United States Constitution?

Cause No. 2

Is Section 13-a of the Emergency Housing Rent Control Law of the State of New York (Laws 1950, ch. 250) in conflict with the Federal Housing and Rent Act of 1949, and violative of Article VI of the United States Constitution?

Opinions Below

The opinion in the Municipal Court in Cause No. 1 is printed in said Record at pages 20 to 26. No opinion was rendered by the Municipal Court in Cause No. 2.

One opinion was rendered by the Court of Appeals of the State of New York covering all issues raised by both causes and is reported in 301 N. Y. 346 and printed in the Record of Cause No. 1 (pp. 34 to 57).

Statutes Involved

The pertinent statutes and relevant portions thereof are set forth in the Appendix (p. 15).

Reasons for Granting the Writ

The legal issues presented by the determination of the Court of Appeals are of primary importance to all of the states in the Union and to the major cities in the country; particularly when it is likely that emergency rent legislation may be effective for some time, it is important to determine how far a state or duly authorized municipality may go in enacting concurrent legislation. In the absence of a clear preemption in the federal statute enacted under the war powers, the instant causes afford an opportunity for this Court to settle the issue as to how far the states and municipalities may go in the enactment of their concurrent legislation. The determination by the Court of Appeals raises substantial federal questions, both novel in nature and of first impression. This Court should accept them for review.

ARGUMENT

Concerning Cause No. 1

The exercise by New York State of its reserve police power in the face of a shortage of residential housing was not only proper, but absolutely necessary. *Marcus Brown Holding Co., Inc.* v. *Feldman,* 256 U. S. 170 (1921), *Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U. S. 242 (1922), *Block* v. *Hirsh,* 256 U. S. 135 (1921), *People ex rel. Durham Realty Corp.* v. *LaFetra,* 230 N. Y. 429. This Court, in *Viex* v. *Sixth Ward Building and Loan Ass'n of Newark,* 310 U. S. 32, 40, noted that:

> "Such authority (police power) is not limited to health, morals and safety. It extends to economic

> needs as well. Utility rate contracts give way to this power as do contractual arrangements between landlords and tenants."

Police power may be used "in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be clearly and immediately necessary to the public welfare." (*Noble State Bank* v. *Haskell*, 219 U. S. 104, 111 (1911). It is, in effect, only limited by the needs of the community.

This Court, in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, laid down the rule with respect to the permissible area of judicial inquiry into a legislative finding of an emergency:

> "Where the question of what the facts establish is a fairly debatable one, we accept and carry into effect the opinion of the Legislature" (p. 196).

See also *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 510.

There is no question of preemption presented in this case. See the opinion of the Court of Appeals at 301 N. Y. 346, 364. The New York Court of Appeals previously recognized that concurrent jurisdiction existed on the subject of rent control (*Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419, 425). This Court has emphasized that there must be a clear manifestation of Congressional intent to prevent the states from exercising their police powers. *Missouri K. & T. R. Co.* v. *Harris*, 234 U. S. 412, 418, 419 (1949); *Allen Bradley Local* v. *Board*, 315 U. S. 740, 749 (1942); *Matter of Davega City Radio, Inc.* v. *State Labor Regulations Board*, 281 N. Y. 13 (1939).

It further has been settled that even if the Federal Government has legislated in a particular field, local regulation in that field is not necessarily prohibited unless national uniformity is essential or required by statute. Compare the 1946 amendment to the Emergency Price Control Act of 1942 extending the effective date of June 30,

1947 (Public Law 548, 60 Stat. at p. 664) where the following provision is found:

> "While maximum rents are in effect under this Act with respect to housing accommodations in any defense rental area, such housing accommodations shall not be subject to rent control by any state or local government."

Significantly, this provision was not incorporated in the Housing and Rent Act of 1947 (*supra*), nor the amendatory acts of 1948 and 1949.

It is manifest that with the relaxation of federal control, some of the state or local governments might find it essential to apply substitute controls. This view was adopted in *Molnar* v. *Curtin*, 273 App. Div. 322 (1st Dep't, 1948), aff'd, 297 N. Y. 967 (1948), and *Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419, 425 (1948). In the latter case, the Court said:

> "Emergency control of rents and evictions would seem to be an affair for concurrent federal and state action at least until the field is pre-empted by Congress and so long as local legislation in that field does not conflict with the letter or policy of any federal enactment * * *. Neither the Federal Housing Rent Act of 1947 * * * nor that of 1948 contains any prohibition against complementary action."

The Act of 1949 is an amended extension of the Act of 1947 as that was amended by the Act of 1948. Though there were changes in the nature of the housing accommodations which were controlled and in the standards and methods of adjustment of maximum rentals, there was nothing included in the new statute to show an intention to prohibit complementary action on the local level. When the Act of 1947 was signed, the President called for local action. His statement reads (U. S. Code Congressional Service, 1947, at p. 1868):

> "Since Federal rent control is being irreparably weakened, I appeal to the governments of the States—par-

ticularly where rental housing is more prevalent—to exert every effort to protect tenants from hardships, eviction, or exploitation. They can soften, although not void completely, the blow to rent control dealt by H. R. 3203."

In the construction of statutes Justice Holmes reminded us that "• • • a page of history is worth a volume of logic." (*N. Y. Trust Co.* v. *Eisner*, 256 U. S. 345, 349).

The basic question posed, therefore, which requires settlement by this Court is at what point shall the variance between the state and federal statutes be considered such a conflict as to cause the local law to be deemed in violation of the Federal Statute and contrary to the Supremacy Clause.

In the application of the principle of supremacy of an act of Congress "the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 277, 243 (1859); *Missouri, K & T. R. Co.* v. *Haber*, 169 U. S. 613, 623 (1899); *R. F. C.* v. *Central Republic Trust Co.*, 17 Fed. Supp. 263, 294 (1936), aff'd. sub. nom. *R. F. C.* v. *McCormick*, 102 Fed. (2d) 305 (1939), cert. den. 308 U. S. 588 (1940).

The contention that Local Law 73 is invalid as in conflict with the federal statute is, upon analysis, no more than a variant of the argument that the federal government has preempted the field of rent control. For since it is plain that no state or local government could increase the rental maximum above that set by the federal government, then the effect of the contention that the state or local government cannot fix a maximum below the maximum fixed by the federal government is to preclude any action by the state or local government with respect to residential rent control, even in the absence of any express or implied pre-emption in the field. Consequently, if the Congress has not pre-empted the field of rent control, the only area left to the state or local governments is the fixation of a maximum below that fixed by the federal government. The failure of Congress thus to pre-empt the field necessarily

demonstrates that the fixation of a maximum below that of the federal government is not in conflict with the federal statute.

Thus, in *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188 (1933) this Court upheld a Missouri statute imposing more stringent restrictions upon trading in grain than that provided for in the federal statute. Mr. Justice Brandeis speaking for this Court, said (288 U. S. 188, 199):

> "The Missouri Law is in no way inconsistent with the provision of the Federal Act. It does not purport to legalize transactions which the Federal Act has made illegal. It does not prescribe regulations for exchanges. Obviously, manipulation of prices will not be made easier, or the prevention of such manipulation be made more difficult, because the State has declared that certain dealings in futures are illegal and has forbidden the maintenance within its borders of places where they are carried on. Since there is nothing in the state law which is inconsistent with, or could conceivably interfere with the operation or enforcement of, the federal law, the statute of Missouri was not superseded. Compare Savage v. Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 S. Ct. 715."

Thus, the establishment of a lower maximum rent pursuant to Local Law 73 would not "* * * legalize trasactions which the Federal Act has made illegal." This Court enunciated the principle once again in *McCormack* v. *Brown*, 286 U. S. 131, where the question of conflict between the West Virginia prohibition statute and the National Act on the subject was presented to this Court. At page 143 this Court held:

> "While state legislation can not give validity to acts prohibited by the Eighteenth Amendment, that legislation may provide additional instruments to make prohibition effective * * *."

and at page 144:

> "The mere fact that a state statute has broader scope than a provision of the National Prohibition Act upon the same subject does not affect its validity."

It has been argued that since the Local Law tends to strengthen the protection for the tenants that it thus falls into conflict with the underlying statute, to wit, the Federal Housing and Rent Act.

State laws which impose more stringent requirements on the same subject than those required by the national legislation have repeatedly been upheld as supporting the underlying policy of the national program and not being in conflict therewith. *Savage* v. *Jones,* 225 U. S. 501; *Reid* v. *Colorado,* 187 U. S. 137; *Matter of Tartaglia* v. *McLaughlin,* supra; *Wallach* v. *Ross,* 298 N. Y. 806.

Only if the state legislation would lessen the protection afforded by the national program and thus subvert its enunciated policy or "legalize transactions which the Federal Act has made illegal" *Dickson* v. *Uhlmann Grain Co.* (supra), would the State Act conflict with the national statute.

In *People* v. *Mailman,* 293 N. Y. 887, the New York State War Emergency Act (Laws of 1942—ch. 544) provided that a violation of the Emergency Price Control Act was to be deemed a violation of the New York State War Emergency Act and criminal penalties were provided therefor accordingly. The Administrator of the Office of Price Control filed an amicus curiae brief in the New York Court of Appeals in support of the validity of the New York State statute. The National Government, through the Price Control Agency, took the position that the State Act was not in conflict with the Federal Statute.

The New York Court of Appeals concluded that the State War Emergency Act was not in conflict with the Emergency Price Control Act of 1942 and affirmed the lower court which took the view:

> "From an examination of the legislation as a whole one can not escape the conclusion that the State of New York is making an all out effort to back the national government in its effort to bring the war to a speedy and successful termination" (49 N. Y. S. 2d, 733 at p. 738).

The instant situation is basically similar since the State of New York, through Local Law 73, as validated by the State Legislature, is supporting the national program in preventing inflation of rents and controlling evictions. Nevertheless, the Office of Housing Expediter filed an amicus brief with the New York Court of Appeals viewing Local Law 73 as being in conflict with the Federal Rent Statute. In the light of such variance in positions taken by the Federal agencies on closely analogous problems, this Court should settle the issue.

The conclusion of the Court of Appeals that Local Law 73 is in conflict with the Federal Rent Statute stems from its erroneous view that the mere issuance of a federal order increasing the maximum rent created property rights in the landlord. In its opinion it referred to the Federal Statute as containing a "rent fixing formula" (301 N. Y., at p. 365). At the conclusion of the same paragraph the Court refers to the Federal Housing Expediter's orders as having been grants of "rent increases". The Federal Housing Expediter's orders were merely permissive in nature, relaxing to the extent indicated the rent ceilings theretofore in effect. Thus, the Municipal Court Justice, in upholding Local Law 73, correctly viewed the order as being "permissive rather than mandatory" (R. p. 25). The new rent maximum does not represent a rate, but merely a ceiling above which rent may not be collected. If the ceiling rent were an absolute rate to be paid rather than the mere maximum, it can no more be modified by agreement to pay and accept less than could a rate order. Cf. *Texas and Pacific Railway Co.* v. *Mugg*, 202 U. S. 242 (1906).

The issue presented by this cause requires settlement by the Court.

Concerning Cause No. 2

This cause presents for determination the identical legal issue as is being presented simultaneously in the case of Stern, petitioner, against Teeval, Inc., respondent, to wit, the constitutionality of Section 13-a of the Emergency Housing Rent Control Law of the State of New York (Laws 1950, ch. 250).

Counsel for the petitioner herein has examined the petitions submitted to this Court by Stern and the Attorney General on behalf of the State of New York in support of the constitutional validity of said section.

Petitioner subscribes and supports the legal views set forth in both of said petitions as the basis for the granting of the petition in Cause No. 2 herein. Petitioner does not desire to burden this Court with repetitious arguments and for that reason does not repeat them at length.

It does appear, concerning this cause, that on May 1, 1950, the effective date of the New York State Rent Control Law, that the Federal Rent Statute was no longer in effect, having already been supplanted by this State measure, in accordance with the Federal Housing and Rent Act of 1949, Section 204, subdivision (j). The State of New York could therefore, in the exercise of its police power, validly enact such legislation as it deemed necessary to meet the emergency existing on May 1, 1950.

The New York Court of Appeals in its determination approved that portion of the State Rent Statute which rolled rents back commencing with May 1, 1950 to the March 1, 1949 level in the City of New York and the Court properly concluded that "such a statutory rollback of rents is nothing new" (301 N. Y. at p. 360). Petitioner submits that the Court arbitrarly created a distinction without a legal basis when it concluded that the sovereign state of New York could not protect its citizens against the enforcement by landlords of administrative orders issued prior to May 1, 1950 by the Office of Housing Expediter.

Presuming that we view the issuance of such order as creating a property right, yet property rights, regardless of their source, must always yield to the exercise of the police power.

It would further seem that all that the Housing Expediter's order did was to restore the landlord to his common law right to demand from the tenant rent for the accommodation to the extent indicated by the new maximum established by Rent Agency. The landlord therefore, within such area, became free to demand, subject always to local law and the reserved police power lodged within the state, an amount up to the new ceiling in accordance with such common law right. The Expediter's order removed, to the extent indicated therein, the previously existing legal impediment.

This cause, moreover, presents the issue as to whether the State of New York may not determine for itself which class of litigants may enter its local courts. The landlord enforcing an order obtained under a Federal Statute could invoke the jurisdiction of the Federal District Court, but it is submitted that the sovereign state of New York, under the view taken by the New York Court of Appeals, is precluded from determining the extent of jurisdiction in its own courts.

The issues presented by Cause No. 2 require settlement by this Court and certiorari should issue, as prayed.

CONCLUSION

It is respectfully urged that writs of certiorari should issue in both of the causes. The legal issues presented require determination by this Court.

Dated: New York, N. Y. October 2, 1950.

Respectfully submitted,

BARNEY ROSENSTEIN,
PAUL L. ROSS,
Attorneys for Petitioner.

APPENDIX

Relevant Portions of

FEDERAL HOUSING AND RENT ACT OF 1949

Sec. 201. (a) The Congress hereby reaffirms the declaration in the Price Control Extension Act of 1946 that unnecessary or unduly prolonged controls over rents would be inconsistent with the return to a peacetime economy and would tend to prevent the attainment of the goals therein declared.

(b) The Congress therefore declare that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because of the inadequacies of the maximum rents applicble to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency.

(c) To the end that these policies may be effectively carried out with the least possible impact on the economy pending complete decontrol, the provisions of this title are enacted. [61 Stat. 196, 50 U. S. Code, App., Sec. 1891.]

Sec. 204 (b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, and subsections (h) and (i), during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no persons shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title: *Provided, however,* That the landlord certifies that he is maintaining all services furnished as of the date determining the maximum rent and that he will continue to maintain such services so long as the adjustment in such maximum rent which may be granted continues in effect. In making and recommending individual and general adjustments to remove hardships or to correct other inequities, the Housing Expediter and the local boards shall observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a fair net operating income from such housing accommodations. In determining whether the maximum rent for controlled housing accommodations yields a fair net operating income from such housing accommodations, due consideration shall be given to the following among other relevant factors: (A) Increases in property taxes; (B) unavoidable increases in operating and maintenance expenses; (C) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement, and mainten-

ance; (D) increases or decreases in living space, services, furniture, furnishings, or equipment; and (E) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement, or maintenance.

Sec. 204 (j) (1) Whenever the governor of any State advises the Housing Expediter that the legislature of such State has adequately provided for the establishment and maintenance of maximum rents, or has specifically expressed its intent that State rent control shall be in lieu of Federal rent control, with respect to housing accommodations within defense-rental areas in such State and of the date on which such State rent control will become effective, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this Act, as amended, with respect to housing accommodations within such State shall be terminated as of the date on which State rent control is to become effective. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(2) If any State by law declares that Federal rent control is no longer necessary in such State or any part thereof and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this Act, as amended, with respect to housing accommodations within such State or part thereof shall be terminated on the fifteenth day after receipt of such advice. As used in this subsection the term "State" means any State, Territory, or possession of the United States.

(3) The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached

as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village: *Provided, however,* That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter: *And provided further,* That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area. [(j) added by 1949 Housing and Rent Act.]

Sec. 209. (a) No action or proceeding to recover possession of any controlled housing accommodations with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless—

(1) under the law of the State in which the action or proceeding is brought the tenant is (A) violating the obligation of his tenancy (other than an obligation to pay rent higher than rent permitted under this Act or an obligation to surrender possession of such housing accommodations) or (B) is committing a nuisance in such housing accommodations or using such housing accommodations for an immoral or illegal purpose or for other than living or dwelling purposes;

(2) the landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations, or for the immediate and personal use and occupancy as housing accommodations by a member or members of his immediate family, or, in the case of a landlord which is an organization exempt from taxation under section 101 (6) of the Internal Revenue Code, for the immediate and per-

sonal use and occupancy as housing accommodations of members of its staff: Provided, That in the case of housing accommodations in a structure or premises owned or leased by a cooperative corporation or association no action or proceeding under this paragraph or paragraph (3) to recover possession of any such housing accommodations shall be maintained unless stock in the cooperative corporation or association has been purchased by persons who are then stockholder tenants in occupancy of at least 65 percentum of the dwelling units in the structure or premises and are entitled by reason of stock ownership to proprietary leases of dwelling units in the structure or premises; but this proviso shall not apply where such corporation or association acquires or leases such structure or premises after the effective date of the Housing and Rent Act of 1948 pursuant to a contract entered into prior to such date;

(3) the landlord has in good faith contracted in writing to sell the housing accommodations to a purchaser for the immediate and personal use and occupancy as housing accommodations by such purchaser;

(4) the landlord seeks in good faith to recover possession of such housing accommodations (A) for the immediate purpose of substantially altering or remodeling the same for continued use as housing accommodations, or for the immediately purpose of conversion into additional housing accommodations, and the altering, remodeling or conversion cannot practically be done with the tenant in occupancy, and the landlord has obtained such approval as may be required by Federal, State, or local law for the alterations, remodeling, or any conversion planned, or (B) for the immediate purpose of demolishing such housing accommodations;

(5) the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such; or

(6) the housing accommodations have been acquired by a State or any political subdivision thereof for the purpose of making a public improvement and are rented temporarily pending the construction of such improvement. [(a) as amended by Act of March 30, 1948, Pub. L. 464, 80th Cong., 2d Sess.]

(b) Notwithstanding any other provision of this Act, the United States or any State or local public agency may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulations under which such accommodations are administered: *Provided,* That nothing in this subsection shall be deemed to authorize the maintenance of any such action or proceeding upon the ground that the income of the occupants of the housing accommodations exceeds the allowable maximum unless such income, less any amounts paid to such occupants by the Veterans' Administration on acount of service-connected disability or disabilities, exceeds the allowable maximum.

(c) No tenant shall be obliged to surrender possession of any housing accommodations pursuant to the provisions of paragraph (2), (3), (4), (5), or (6) of subsection (a) until the expiration of at least sixty days after written notice from the landlord that he desires to recover possession of such housing accommodations for one of the purposes specified in such paragraphs. [61 Stat. 200, as amended, 50 U. S. Code, App., Sec. 1899.]

Relevant Portions of

LOCAL LAWS OF THE CITY OF NEW YORK

For the Year 1949

No. 73

§ U41-7.0. *Protection of tenants in apartments from eviction and collection of excessive rents.*—a. Declaration of policy. It is hereby declared that a serious emergency exists in the city of New York by reason of the shortage of apartments and by reason of demands for excessive rent increases which will cause wholesale evictions. Unless evictions from such accommodations are regulated, disruptive practices and abnormal conditions will produce serious threats to the health, safety and general welfare of the inhabitants of the city. Action by local law is necessary to prevent wholesale evictions, chaos and confusion resulting from such disruptive practices. It is hereby declared to be the policy of the city to impose certain additional restrictions upon the right to evict tenants from apartments and upon increases in rents for apartments in the city, for the purpose of alleviating the present housing emergency and preventing abuses.

Sec. 1. c. Rents not to exceed maximum. It shall be unlawful for any person to demand, accept or receive from any tenant for the use or occupancy of any apartment a rent therefore greater than the rent which was being received by the landlord for said apartment on March first, nineteen hundred and forty-nine, unless the commission shall by appropriate order authorize the collection of a higher rent for said apartment.

The commission is hereby authorized to adjust the rent of any apartment within the city of New York, due and payable therefore after March first, nineteen hundred and forty-nine, to such amount as it may deem just and rea-

sonable consistent with the emergency, provided that the landlord shall allege and prove that he is presently providing substantially the same services, facilities, accommodations and maintenance which the landlord was legally obliged to provide on June thirtieth, nineteen hundred and forty-seven, and further provided that such rent so adjusted by the commission shall in no event be less than the rent payable therefor on the first day of March, nineteen hundred and forty-nine, except that the commission shall have the power by regulation or order to decrease the maximum rent for any apartment, if the commission should find that the landlord has decreased the services, facilities, accommodations, or maintenance to which the tenant was entitled on June thirtieth, nineteen hundred and forty-seven.

In determining just and reasonable rent consistent with the emergency of any apartment in the city of New York, the commission shall require the landlord to furnish to it such relevant data in writing, including but not limited to a statement of the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building; the number of rooms in each apartment; the number of commercial and business occupants in such building and the rent received for each such apartment, commercial and business occupants for the period of three years last past. The landlord shall also furnish to the commission a statement of the consideration paid by him for the property if he be the owner thereof or if he be the lessee, the rent agreed to be paid by him, the assessed valuation of the property and the taxes thereon for the past three years, the operating expense for such period with reasonable detail and such other relevant data as the commission may require.

No adjustment in rent shall be made by the commission unless a hearing shall have been held before the commission or a hearing officer designated by it at which hearing any interested party may appear in person or by counsel and examine and cross-examine witnesses and introduce

such evidence as the commission or such hearing officer may determine is relevant to the issues involved.

d. Evictions. No tenant shall be removed from any apartment by action or proceeding to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any action or other proceeding be commenced for the collection of any rent greater than the rent due and payable on the first day of March, nineteen hundred and forty-nine or for non-payment of such greater rent unless the commission has certified that such rent for the non-payment of which the removal is sought or for the collection of which judgment is demanded, has before the commencement of such action or proceeding, been certified as just and reasonable consistent with the emergency, by the commission, or that the commission has certified that one or more of the following grounds for such exclusion or eviction exists.

(1) The tenant is (a) violating an obligation of his tenancy other than an obligation to pay rent higher than the maximum rent which the landlord is legally entitled to demand or receive, or an obligation to surrender possession of such apartment or (b) subject to the provisions of subdivision f of this section, is committing a nuisance in such apartment or using such apartment for an immoral or illegal purpose or for other than living or dwelling purposes;

(2) Subject to the provisions of subdivisions i and j of this section, the landlord, because of compelling necessity, seeks in good faith to recover possession of such apartment for his own immediate and personal use and occupancy as dwelling accommodations;

(3) Under the circumstances specified in subdivisions g and h of this section, the landlord seeks in good faith to recover possession of such apartment for the immediate purpose of substantially altering, remodeling, or demolishing such apartment or a building or structure contain-

ing the same and all of the conditions and requirements specified in such subdivisions g and h have been fully complied with.

(4) The apartment consists of non-housekeeping, furnished housing accommodations located within a single dwelling unit not used as a rooming or boarding house and the remaining portion of which is occupied by the landlord or his immediate family.

e. Eviction certificate; application required. Prior to the institution of any summary proceedings or any other action or proceeding to evict a tenant or to recover possession of an apartment, except for non-payment of rent no greater than that which was being received by the landlord for said apartment on March first, nineteen hundred forty-nine, the person instituting such action or proceeding shall file in triplicate with the commission, a verified application for a certificate of eviction. Such application shall contain a detailed statement of the facts upon which such action or proceeding is based. The commission shall promptly transmit a copy of such application to the department of housing and buildings and the department of health, which departments shall promptly furnish the commission with such information or reports as the commission shall require concerning the premises and the tenants thereof, described in the application filed pursuant to this subdivision.

The commission shall, as promptly as is practicable, render its determination granting or denying a certificate under subdivision d of this section and shall promptly notify the person filing such application for such certificate, of such determination.

Relevant Portions of

NEW YORK STATE EMERGENCY HOUSING RENT CONTROL LAW OF 1950

Chapter 250, Laws of New York, 1950

§ 13-a. 1. The legislature hereby finds that a substantial number of tenants in this state may be subject to potential liability arising from certain provisions of the federal housing and rent act of nineteen hundred forty-seven, as amended, pursuant to which increases in maximum rentals were authorized; that an effort has been made to curb certain of such increases through the enactment of local laws which have been validated by state statute; that the validity of such local laws and state statute is presently the subject of litigation; that if such local laws or state statute are held to be invalid, wholly unexpected liabilities, substantial in amount and in some cases retroactive in operation will be imposed upon many tenants; that such claims will lead to evictions and create severe dislocation and hardship in many instances and engender uncertainty; that these occurrences would intensify the emergency arising from the acute shortage of dwellings; that pursuant to the federal housing and rent act of nineteen hundred forty-seven as amended, enactment into law of this chapter, will supplant federal controls with state controls; and that such dislocation, hardship and uncertainty will interfere with the orderly regulation and control of residential rents contemplated by the re-enactment of this act. The legislature finds that all of the foregoing facts constitute a serious and substantial threat to the health, welfare and safety of the people of the state and enacts the following provision as an exercise of its police power.

2. No person shall be subject to liability in any action or proceeding commenced prior to or on or after the date this subdivision takes effect on account of the failure of such

person to pay an increase in rental authorized by any order made by the federal housing expediter between March first, nineteen hundred forty-nine and the date this section takes effect, pursuant to the federal housing and rent act of nineteen hundred forty-seven, as amended, the collection of which was barred or purportedly barred by any local law enacted by the local legislative body, the board of estimate and the mayor of the city of New York and specified in chapter one of the laws of nineteen hundred fifty, except where such an increase is or has been:

(a) authorized pursuant to the provisions of paragraph (a) of subdivision one of section four hereof;

(b) approved prior to the time this section takes effect pursuant to such local laws; or is

(c) compensable pursuant to an express provision of a written rental agreement in effect at the time such increase was granted or prior to the time this subdivision takes effect.

No court of this state, or of any municipality, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the time this subdivision takes effect, to accord any remedy for the recovery of real property or for the possession thereof, for or on account of the failure of any person to pay any such increase, to the extent that such action or proceeding seeks to enforce any liability or a remedy with respect to any such increase other than those specified in subparagraphs (a), (b) and (c) of the preceding paragraph of this subdivision.

3. Nothing herein shall be construed, however, to authorize recovery of any such increase paid pursuant to any such order prior to the effective date of this subdivision.

4. Notwithstanding any inconsistent provision of law, if any law which purports to control rents or evictions shall

hereafter be held invalid or unconstitutional in whole or part, no action or proceeding for the collection of rent or for the recovery of real property or for the possession thereof, which was previously regulated, barred or limited in any way by such law, shall be commenced in any court until thirty days have elapsed from the date of the final judgment or order holding such law invalid or unconstitutional in whole or part. With respect to any such action or proceeding commenced prior to, and not reduced to final judgment on or before the date of such adjudication of invalidity or unconstitutionality, entry of judgment in favor of the plaintiff shall be deferred for a like period upon motion of any party.